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No.

In The

Supreme Court Of The United States

October Term, 1992

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF C.G.F.:
T.F. AND D.L.,

Petitioners,

v.

H.F. and F.F.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Wisconsin Supreme Court's interpretation of state law, recognizing and granting visitation rights to the grandparents of the child in question, unduly burden the substantive due process rights of the natural mother, and the adoptive father, who had married and formed an intact family unit and who objected to such visitation, in the absence of any evidence of harm to the child if visitation was denied, or of unfitness of the parents?

II.

Were the natural mother and adoptive father denied equal protection where state law subjected them both to grandparent visitation proceedings because the natural father was dead, since married couples consisting of two natural parents or consisting of a natural parent and an adoptive parent, where a natural parent is not dead, are not subject to such grandparent visitation claims?

LIST OF PARTIES

The parties to the state court proceedings were Petitioners, T.F. and D.L., the natural mother and adoptive father who were living together in a legal marital relationship as custodians of C.G.F., the minor child in question, and Respondents, H.F. and F.F., the grandparents of C.G.F.

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OPINIONS BELOW

The trial court below entered an unpublished order on November 14, 1990, a copy of which is attached hereto as Appendix C, providing provisional visitation rights for grandparents, H.F. and F.F., and providing further that, in the event of the adoption of the child by D.L., the visitation order would become moot and have no force or effect.

On July 3, 1991, the Wisconsin Court of Appeals, in an unpublished decision, a copy of which is attached hereto as Appendix B, affirmed the trial court's order.

The Supreme Court for the State of Wisconsin subsequently granted discretionary review of the grandparents' approval and on May 7, 1992 rendered its published decision,

In re Grandparental Visitation of C.G.F., 483 N.W.2d 803 (Wis. 1992), reversing the court of appeals and the trial court.

The Supreme Court of Wisconsin denied Petitioner's Motion for Reconsideration on June 23, 1992, a copy of which is attached hereto as Appendix A.

JURISDICTION

The final judgment of the Wisconsin Supreme Court was entered on May 7, 1992. Petitioners T.F. and D.L. filed a Motion for Reconsideration as to the constitutional issues in the case that had been raised in briefing and oral argument for the Wisconsin Supreme Court, but which were not specifically addressed in the court's decision. The Motion for Reconsideration was denied on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

U.S. CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

U.S. Constitution, Amendment XIV:

> ...[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat. § 880.155 (West Supp. 1990) Visitation by grandparents:

> If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor child may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. The court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interest and welfare of the child, may

issue any necessary order to enforce the same, and may, from time to time modify such privileges or orders upon a showing of good cause.

STATEMENT OF THE CASE

In the beginning, there existed an intact family unit comprised of a husband, wife and child. On January 15, 1988, the husband died and the child continued to reside with the wife. The grandparents of the child, parents of the deceased husband, continued to visit the child. Relations between the wife and the grandparents grew increasingly strained and their visitation of the child was halted. The wife later remarried on September 6, 1990. The stepfather commenced proceedings to legally adopt the child and in the interim, the grandparents petitioned for visitation rights to the child pursuant to Wis. Stat. Ann. § 880.155 (West Supp.1990).

An evidentiary hearing was held on October 9, 1990. The trial court found that it was in the child's best interests to have visitation with the grandparents. However, it further ordered that, if the adoption proceeded and was ordered by the court, the visitation order would become moot and have no force or effect.

The grandparents appealed the contingent termination provision of the visitation order. The court of appeals affirmed the trial court order.

The Wisconsin Supreme Court granted discretionary review, and on May 7, 1992 reversed the court of appeals and the trial court. The court found that grandparent visitation could be ordered over the parents' objections.

SUMMARY OF ARGUMENT

The decision of the Wisconsin Supreme Court denies the substantive due process rights of parents as guaranteed by the Fourteenth Amendment by holding that grandparents of a child have visitation privileges over the objections of the parents

where there is no provable harm to the child in the absence of visitation and no proof of unfitness of the parents.

The proliferation of state third party visitation statutes has created a menagarie of conflicting rights with no coherent jurisprudence. Each state has passed statutes granting visitation rights to grandparents with their grandchildren in at least some circumstances. These visitation statutes create or encourage a relationship between grandparents and grandchildren. Yet, state adoption statutes, on the other hand, terminate that relationship. Conflict is inevitable. Because state courts have held and more than likely will continue to hold, in favor of visitation rights, the due process rights and equal protection rights of parents have been, and thus will continue to be, violated.

The state statute, as applied, which draws a distinction between the parental rights of a wife and stepfather where the natural father of a child has died and where the natural father's relationship was terminated by judicial proceeding, violates the Equal Protection rights of the parents since such categorization is not a legitimate or compelling government objective.

ARGUMENT

I. THE GRANTING OF GRANDPARENT VISITATION PRIVILEGES OVER THE OBJECTIONS OF PARENTS, WHERE THERE IS NO PROVABLE HARM TO THE CHILD IN THE ABSENCE OF SUCH VISITATION AND NO PROOF OF UNFITNESS OF PARENTS, UNCONSTITUTIONALLY VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS OF PARENTS.

In *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), this Court upheld a unitary family's custody of its child as against claimed liberty interests of foster families. The foster parents had claimed that the psychological tie between a child and its parents created a

"psychological family" which needed to be given constitutional recognition. *Id.* at 839. In ruling against the foster families, this Court stated that "biological relationships [were] not the exclusive determination of the existence of the family," *id.* at 843, but that liberty rights of the family exist only in the "intrinsic human rights . . . as they have been understood in this Nation's history and tradition." *Id.* at 845.

These "intrinsic human rights" have been recognized to include the right of individuals to marry, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as marriage is the basic foundation of the family in our society, *Smith*, 431 U.S. at 843. Since marriage is not a matter of blood relation, but a civil contract, it has been perceived as the "purest tie of social life," *Maynard v. Hill*, 125 U.S. 190, 212 (1887), whose freedoms are fundamental. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Here, the second marriage of the wife to the adoptive father inures the same fundamental freedoms as any marriage. Indeed, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), this Court upheld as constitutional a presumption of legitimacy for a child born in marriage even as against the natural father. *Id.* at 118-130.

Concomitant to the fundamental freedom of marriage is the liberty interest that provides the right of parents to "establish a home and bring up their children" according to the dictates of their own conscience. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In fact, this Court has stated, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . [a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), absent clear and present danger to the children. *Id. See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In this case, the parents had exercised their fundamental right to marriage and were subsequently raising their child.

Their objections to grandparent visitation should be honored because they flow from the fundamental rights to marry and raise children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Wisconsin Supreme Court has decided that "the statute allows the Trial Court, in the best interest of the child, to order grandparental visitation in direct opposition to the wishes of the custodian regardless of who the custodian is." *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992). The Wisconsin Supreme Court's application of the visitation statute and subsequent forced visitation seriously undermines the fundamental rights of the parents.

While the State may proscribe the conditions under which the marriage relation may be created, *Pennoyer v. Neff*, 95 U.S. 714, 735-36 (1877), the contours of a marital relation are established by history and tradition. *Smith*, 431 U.S. at 845. Mandating grandparent visitation over parents' objections elevates third party rights to the level of the fundamental rights of parents in the upbringing of their children. This violates the traditional social structure and the recognized fundamental rights of parents. *See generally Wisconsin v. Yoder*, 406 U.S. 205 (1972). In addition, allowing a trial court to define the contours of the basic characteristics of familial relationships on an ad-hoc basis takes away the right of families to order their social lives. The "best interest of the child" cannot be held to justify intrusion into family life absent proof of unfitness. *See Smith*, 431 U.S. at 862-63 (1977) (Stewart, J., concurring).

Although the privilege of adoption is a creature of the state, the purpose of this privilege is to create an intact family. The family is more than just a statutory creation, it is a unit traditionally and legally recognized and protected. The fundamental right of parents to raise their children as they see fit is an essential element to the intact family.

Similarly, the right to visitation is also a creature of the state. But unlike adoption statutes, visitation statutes do not

create a fundamental right. Nonetheless, some states are beginning to recognize grandparent visitation rights to the detriment of constitutionally protected due process interests of parents.

Several states have addressed the issue of whether grandparent visitation unconstitutionally interferes with parents' rights. *Lehrer v. Davis*, 571 A.2d 691, 695 (Conn. 1990) (Concluding "the custodial rights of an intact family do not automatically preclude the visitation rights of grandparents" but the constitutional validity of the visitation statute was "not ripe for adjudication" in this case because of factual inadequacy.); *Sketo v. Brown*, 559 So.2d 381, 382 (Fla. Dist. Ct. App. 1990) (Grandparent visitation statute not facially unconstitutional; state has a compelling interest in the welfare of children and may find visitation to be in the best interest of child notwithstanding natural mother's objection based on Fourteenth Amendment right to raise child "as she sees fit"); *Smith v. Finstad*, 277 S.E.2d 736 (Ga. 1981) (Held grandparent visitation statute as applied to natural mother and stepfather was not unconstitutional); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) (Upheld constitutionality of grandparent visitation statute recognizing that the statute "seeks to balance the fundamental rights of the parents, grandparents and the child"); *Bailey v. Menzie*, 542 N.E.2d 1015, 1020 (Ind. Ct. App. 1989) (Statute permitting grandparent visitation after adoption of child by a stepparent is constitutional because it "interferes with a parent's liberty interests only to observe its duty under the *parens patriae* doctrine and only upon a finding that it would be in the best interest of the child"); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1253 (Ohio Ct. App. 1986) (Third party visitation statute "is a constitutional statutory means by which the state asserts a compelling governmental interest"); *But cf. In re Marriage of Herreras*, 768 P.2d 673, 674 (Ariz. Ct. App. 1989) (Provision of grandparent visitation statute that automatically terminated visitation rights upon adoption does not violate due process because grandparents' interests are statutory, not fun-

damental); *Cox v. Stayton*, 619 S.W.2d 617, 620-21 (Ark. 1981) (Adoption statutes do not unconstitutionally deprive grandparents of their rights to grandchildren without due process because grandparents have no constitutionally protected rights to be deprived of in regards to their grandchildren); *Ward v. Ward*, 537 A.2d 1063, 1068-69 (Del. Fam. Ct. 1987) (Amendment to grandparent visitation statute restraining visitation when both parents, natural or adoptive, are cohabitating as husband and wife, is constitutional because grandparents have a liberty interest only when the grandparent-grandchild relationship is custodial).

Although this Court has recognized "extended family" rights as against the state, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), these rights have not been recognized as against the fundamental rights of parents. Research has indicated that the "extended family of several generations, with all its relatives" really never existed on "any grand scale in America," with only six percent of households in America containing grandparents, parents, and children. Francis L.K. Hsu, *Roots of the American Family: From Noah to Now, in Kin and Communities: Families in America* 219, 225 (Allan J. Lichtman et al. eds., 1979). The "extended family" was never the "American family." Although relationships between grandparents and grandchildren facilitated by visitation rights are important and in many situations are very beneficial, the fundamental rights of parents as established by the Constitution should not be abridged when the two are in direct conflict.

II. STATE LAWS RECOGNIZING GRANDPARENT VISITATION RIGHTS THROUGHOUT THE UNITED STATES ARE SHARPLY DIVIDED AS TO THE EFFECT OF ADOPTION ON SUCH RIGHTS AND ALSO ON THE NATURE OF THE CONSTITUTIONAL INTERESTS OF NON-CUSTODIAL GRANDPARENTS WHEN THEY CONFLICT WITH THE FUNDAMENTAL RIGHTS OF PARENTS.

While all states have enacted laws recognizing grandparent visitation rights, they are sharply divided not only on the effect of adoption on such rights, but also on the nature of the constitutional interests, if any, of non-custodial grandparents when they conflict with the fundamental rights of parents.

At common law, grandparents had no legal right to visitation with their grandchildren. *Succession of Reiss*, 15 So. 151, 152 (La. 1894) ("[T]he obligation ordinarily to visit grandparents is moral, and not legal.").

These rights exist today solely by statutory enactment. Each of the fifty states has passed a statute granting grandparents visitation in at least some circumstances. Ala. Code § 30-3-4 (1975); Alaska Stat. § 25.24.150 (1991); Ariz. Rev. Stat. Ann. § 25-337.01 (1991); Ark. Code Ann. § 9-13-103 (Michie 1991); Cal. Civ. Code § 4351.5 (West Supp. 1992); Colo. Rev. Stat. § 19-1-117 (Supp. 1991); Conn. Gen. Stat. Ann. § 46b-57 (West 1986); Del. Code Ann. tit. 10, § 950(7) (Supp. 1990); Fla. Stat. Ann. § 61.13(2)(b)(2)(c) (West Supp. 1991); Ga. Code Ann. § 19-7-3 (Michie 1991); Haw. Rev. Stat § 571-46(7) (Supp. 1991); Idaho Code § 32-1008 (1983); Ill. Ann. Stat. ch. 40, para. 607(b) (Smith-Hurd Supp. 1992); Ind. Code Ann. § 31-1-11.7-2 (Burns Supp. 1992); Iowa Code Ann. § 598.35 (West Supp. 1992); Kan. Stat. Ann. § 60-1616(b) (Supp. 1991); Ky. Rev. Stat. Ann. § 405.021 (Michie/Bobbs-Merrill 1984); La. Rev. Stat. Ann. § 9:572 (West 1991); Me. Rev. Stat. Ann. tit. 19, §

752 (West 1991); Md. Fam. Law Code Ann. § 9-102 (1991); Mass Gen. Laws Ann. ch. 119, § 39D (West Supp. 1992); Mich. Comp. Laws Ann. § 722.27(b) (West Supp. 1992); Minn. Stat. Ann. § 257.022 (West Supp. 1992); Miss. Code Ann. § 93-16-3 (Supp. 1991); Mo. Ann. Stat. § 452.402 (Vernon Supp. 1992); Mont. Code Ann. § 40-9-102 (1992); Neb. Rev. Stat. § 43-1802 (1988); Nev. Rev. Stat. Ann. §§ 125A.330, 125A.340 (Michie Supp. 1991); N.H. Rev. Stat. Ann. § 458:17-d (Supp. 1992); N.J. Stat. Ann. § 9:2-7.1 (West Supp. 1992); N.M. Stat. Ann. §§ 40-9-2, 40-9-3 (Michie 1989); N.Y. Dom. Rel. Law § 72 (McKinney Supp. 1992); N.C. Gen. Stat. § 50-13.2 (1987); N.D. Cent. Code § 14-09-05.1 (1991); Ohio Rev. Code Ann. § 3109.11 (Anderson Supp. 1991); Okla. Stat. Ann. tit. 10, § 5 (West Supp. 1992); Or. Rev. Stat. § 109.121(1)(a) (1990); 23 Pa. Cons. Stat. Ann. §§ 5311-5312 (1991); R.I. Gen. Laws § 15-5-24.1 - 24.3 (1988); S.C. Code Ann. § 20-7-420(33) (Law. Co-op. 1976); S.D. Codified Laws Ann. §§ 25-4-52 - 25-4-54 (1984); Tenn. Code Ann. § 36-6-301 (1991); Tex. Fam. Code Ann. § 14.03(e) (West Supp. 1992); Utah Code Ann. § 30-5-2 (1989); Vt. Stat. Ann. tit. 15, § 1011(a) (1989); Va. Code Ann. § 20-107.2 (Michie Supp. 1992); Wash. Rev. Code Ann. § 26.09.240 (West Supp. 1992); W.Va. Code §§ 48-2B-1 - 48-2B-7 (Supp. 1992); Wis. Stat. Ann. § 767.245 (1981 & West Supp. 1990); Wyo. Stat. § 20-7-101 (Supp. 1991).

Of the fifty state statutes that grant grandparent visitation rights, twenty-eight are silent on the effect of adoption on grandparent visitation. (The twenty-eight include: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, Utah, Virginia, Washington, West Virginia, Wisconsin). State courts are left to resolve conflicts between state adoption statutes that terminate all relationships between an adopted child and his relatives and third party visitation statutes that grant visitation rights to rela-

tives, i.e., grandparents. Statutes may grant specific visitation rights to relatives while others terminate all legal relationships between an adopted child and his relatives.

State appellate courts, left to resolve this conflict, have reached disparate conclusions. Their decisions can be grouped into four categories: three conflicting and one hybrid. *See* Patricia Wendlandt, Comment, *Grandparent Visitation Statutes: Remaining Problems and the Need for Uniformity*, 67 Marq. L. Rev. 730, 750-52 (1984).

First category: State courts hold that adoption principles prevail over visitation statutes. Adoption terminates a child's legal relationship with his natural relatives and therefore natural grandparents are no longer the child's legal grandparents and lack standing to petition for visitation. *In re Marriage of Herreras*, 768 P.2d 673, 674 (Ariz. Ct. App. 1989); *Wilson v. Wallace*, 622 S.W.2d 164, 165 (Ark. 1981); *Campbell v. Holcomb*, 388 S.E.2d 65, 66-67 (Ga. Ct. App. 1989); *Browning v. Tarwater*, 524 P.2d 1135, 1139 (Kan. 1974); *Smith v. Trosclair*, 321 So.2d 514, 515-16 (La. 1975); *Bikos v. Nobliski*, 276 N.W.2d 541, 544 (Mich. Ct. App. 1979); *Aegerter v. Thompson*, 610 S.W.2d 308, 310 (Mo. Ct. App. 1980); *Mickey v. Beinhauer*, 786 P.2d 1317, 1318 (Or. Ct. App. 1990). Since the adoption statute prevails over the grandparent visitation statute no evaluation of the best interests of the child is required. Termination is strict.

Second category: State courts hold that grandparent visitation statutes prevail over adoption statutes when the adoption is by a stepparent or relative. *Loftin v. Smith*, 590 So.2d 323, 326 (Ala. Civ. App. 1991); *Reeves v. Bailey*, 126 Cal. Rptr. 51, 54 (Cal. Ct. App. 1975); *In re Marriage of Davisson*, 797 P.2d 809, 810 (Colo. Ct. App. 1990); *In Interest of R.C.E.*, 535 So.2d 673, 673-74 (Fla. Dist. Ct. App. 1988); *Lingwall v. Hoener*, 483 N.E.2d 512, 516 (Ill. 1985); *In re Visitation of Groleau*, 585 N.E.2d 726, 727-28 (Ind. Ct. App. 1992); *Patterson v. Keleher*,

365 N.W.2d 22, 25-26 (Iowa 1985); *Hicks v. Enlow*, 764 S.W.2d 68, 72 (Ky. 1989); *Howell v. Rogers*, 551 So.2d 904, 905-06 (Miss. 1989); *In re Visitation of Kanvick v. Reilly*, 760 P.2d 743, 746 (Mont. 1988); *Preston v. Mercieri*, 573 A.2d 128, 134 (N.H. 1990); *Pillars v. Thompson*, 712 P.2d 1366, 1367-68 (N.M. 1986); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1254-55 (Ohio Ct. App. 1986); *Suroviec v. Mitchell*, 500 A.2d 894, 896 (Pa. Super. Ct. 1985); *Chavis v. Witt*, 328 S.E.2d 74, 75 (S.C. 1985); *In re Petition of Nearhoof*, 359 S.E.2d 587, 589, 591 (W. Va. 1987). Under this category, an evaluation of the best interests of the child is required.

Third category: State courts draw a distinction between adoption by a stepparent and adoption by "strangers" or a "new family." In many of these cases, the overriding policies of making a child more adoptable by severing ties to his biological family and preserving the unity of the new family prevail. *In re W.E.G.*, 710 P.2d 410 (Alaska 1985) (Grandparent visitation statute precludes post-adoption visitation by grandparents); *Mitchell v. Erdmier*, 320 S.E.2d 163, 164 (Ga. 1984) ("[N]o rights of visitation by former grandparents exist."); *In re A.C.*, 428 N.W.2d 297, 302 (Iowa 1988) ("The facts . . . demonstrate the wisdom . . . of not imposing grandparent visitation upon adoptive parents in other than stepparent adoptions. The number of prospective adoptive parents for [the child] would be significantly reduced because of the court-imposed grandparent visitation."); *L.F.M. v. Dep't of Social Services*, 507 A.2d 1151, 1154 (Md. Ct. Spec. App. 1986) ("We do not question the sincerity or the depth of the affection that [grandparents] feel for their grandchildren. That affection, however, simply does not translate into a constitutionally protected liberty interest."); *Faust v. Messinger*, 497 A.2d 1351, 1353-54 (Pa. Super. Ct. 1985) ("It is our opinion that adoptive or natural parents should have the right to select the persons with whom their child will associate as long as they properly perform their duties to the child. To take this right away from proper parents would not be

for the best interest of the child."): *Mitchell v. Doe*, 706 P.2d 1100, 1103 (Wash. Ct. App. 1985) ("[U]nder Washington law, [the grandmother] is now a stranger to [the grandchild]. . . . When an adoption has become final, previous ties to natural parents are completely severed and a wholly new relationship is created."); *In re Adoption of R.D.S.*, 787 P.2d 968, 969 (Wyo. 1990) (Grandparent has no visitation rights even though grandmother "has been a primary caretaker"of the child prior to the adoption, had spent Easter, Thanksgiving and Christmas holidays with the child and [adoptive parents] had promised maternal grandmother "she would always be able to see" the child.). However, in other cases, states continue to allow interference, even with intact families. *Johnson v. Fallon*, 181 Cal. Rptr. 414, 418-19 (Cal. Ct. App. 1982) (In the case of a stranger adoption, the court stated, "[a]ny determination of the merits of granting visitation . . . is to be based upon a weighing of the dual considerations of whether doing so is in the best interests of the child and would not unduly hinder the adoptive relationship."); *O'Brien v. Shepley*, 451 So.2d 82, 84-85 (La. Ct. App. 1984) (Court allowed grandparent visitation because it interpreted the spirit of the grandparent visitation statute to allow grandparent visitation not only when one parent had died but when both had died and child had subsequently been adopted.); *New York ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1052 (N.Y. Ct. App. 1981) ("The State, in its role as *parens patriae*, has determined that, under certain circumstances, grandparents should have continuing contacts with the child's development if it is in the child's best interest. . . . Having created the adoptive relationship, the State should be allowed to determine to what extent the child's contacts with its natural family will be ended.").

Fourth category (hybrid): These State courts have stated that if grandparents have court-ordered visitation rights, they cannot be deprived of these rights without due process. Grandparents are therefore constitutionally entitled to receive notice of an adoption proceeding. *Brown v. Meekins*, 643

S.W.2d 553, 554 (Ark. 1982) ("[G]randparents who have court ordered visitation rights . . . are constitutionally entitled to receive notice of an adoption proceeding."); *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806-07 (Wis. 1992) ("Once the grandparents . . . were ordered visitation rights with their minor grandchild, they should not have been deprived of those rights without due process."). States that fall within the first or second category may also fall within the fourth hybrid category if they view court-ordered visitation rights as worthy of due process protection.

The universality of grandparent visitation statutes and deeply divided state law treatment of conflicts between the liberty interests of parents and the interests of non-custodial grandparents makes this case particularly appropriate for review by this Court. Failure to review and resolve this issue will foster confusion over the constitutional landscape of parents' rights and will permit a significant degree of conflict within families. Such a result will, ironically, have a devastating effect on the lives of children, the very group sought to be benefitted by the state statutes in question.

III. THE WISCONSIN STATUTE, AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE AS IT CREATES A DISTINCTION, BETWEEN THE PARENTAL RIGHTS OF AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER HAS DIED AND AN ADOPTIVE PARENT OF A CHILD WHOSE NATURAL FATHER'S PARENTAL RIGHTS WERE TERMINATED BY JUDICIAL PROCEEDING, THAT SERVES NO COMPELLING GOVERNMENT INTEREST.

In subordinating the fundamental rights of parents to grandparent visitation privileges the Wisconsin Supreme Court has unconstitutionally endorsed distinctions between a child

whose adoption was preceded by the death of his biological father and a child whose adoption was preceded by termination of a biological father's relationship through judicial proceedings in construing the fundamental rights of parents as against grandparent visitation privileges in this case. Such distinctions are irrelevant to any legitimate government objectives.

In the opinion below, the Wisconsin Supreme Court, in granting grandparent visitation rights, in effect refused to recognize that adoptive parents could have parental rights equal to those of natural parents. *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992). Though the Court noted that the holding was "an exception that is available only to a very limited class of persons, those children whose natural parent has died and who, subsequently have been adopted by a step-parent," *id.*, such an "undifferentiated distinction", *Caban v. Mohammed*, 441 U.S. 380, 394 (1979), poses a significant infringement on understood parental rights.

The State of Wisconsin asserted its interest in establishing an economic relationship between the child and the biological grandparents, *In re Grandparental Visitation of C.G.F.*, 483 N.W.2d 803, 806 (Wis. 1992), under its probate code, but that interest fails in the context of visitation statutes which involve the fundamental rights of parents. By distinguishing the rights of adoptive parents of a child whose adoption was preceded by the death of a natural parent in regard to visitation, the state makes a distinction that does not bear a substantial relationship to the state's asserted economic interest.

Under equal protection jurisprudence, the state "may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

The State of Wisconsin has not identified an interest sufficient to support its differential treatment of an adoptive parent of a child whose natural parent has died and an adoptive parent

of a child whose natural parent's parental rights have been terminated by judicial proceedings. For these reasons, the Wisconsin Supreme Court's interpretation of Wisconsin law violates the Equal Protection rights of the parents in question.

CONCLUSION

For the reasons and authorities cited, this Petition for a Writ of Certiorari should be granted. This Court should review the issues of whether Petitioners were unconstitutionally deprived of their substantive due process rights and unconstitutionally denied equal protection of the laws.

Respectfully submitted,

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The Court today announced an order in your case as follows:

District 4
F.,H. v. F.,T., 91-0293-FT

Motion for Reconsideration denied, with $50.00 costs.

Marilyn L. Graves
Clerk of Supreme Court

Court of Appeals
Decision
Dated and Released

July 3, 1991

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

Notice

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-0293-FT

State of Wisconsin

Filed July 3, 1991
Clerk of Court of Appeals of Wisconsin

In Court of Appeals
District IV

In the Matter of the Grandparental Visitation of C.G.F.:

H.F. and F.F.,

Appellants,

v.

T.F. and D.L.

Respondents.

APPEAL from an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J. and Sundby, J.

PER CURIAM. H.F. and F.F. (the grandparents) appeal[1] from an order granting them visitation rights with C.F. (the child) but providing that their visitation rights would automatically terminate upon adoption of C.F. by her stepfather. The sole issue is whether the trial court could award visitation rights to the grandparents under sec. 880.155, Stats., notwithstanding the child's adoption by the stepfather. We conclude that, once the adoption is finalized, the trial court lacks power to award the grandparents visitation rights under sec. 880.155. Consequently, we affirm.

The facts are undisputed. The grandparent's son was the child's biological father. He died January 15, 1988. The child continued to reside with her mother, T.F., and the grandparents continued to have visitation with the child.

The mother married the stepfather on September 6, 1990. He commenced proceedings to adopt the child. The grandparents petitioned for visitation rights under sec. 880.155, Stats., which provides,

> If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. The court may grant reasonable visitation privileges to a grandparent if the court determines that it is in the best interests and welfare of the child, may issue any necessary order to enforce the same, and may from time to time modify such privileges or orders upon a showing of good cause.

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[1]This appeal is decided pursuant to the expedited appeal procedure, Rule 809.17, Stats.

The trial court found that it would be in the child's best interest to have visitation with the grandparents. However, it further ordered that, if the adoption proceeds and is ordered by the court, the visitation order shall become moot and have no force or effect.

The grandparents contend that the court can grant then visitation rights under sec. 880.155, Stats., notwithstanding the fact that an adoption has occurred. They argue that sec. 880.155 is an exception to sec. 48.92(1) and (2), Stats., which provides,

> (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents. –
>
> (2) After the order of adoption is entered the relationship of parent and child between the adopted person and his birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.

The relationship between the two statutes is a question of statutory construction that we decide without deference to the trial court's decision. *Van Cleve v. Hemminger*, 141 Wis.2d 543, 545, 415, N.W.2d 571, 572 (Ct. App. 1987).

In re Soergel, 154 Wis.2d 564, 453 N.W.2d 624 (1990), addressed the question whether the paternal grandparents of a child could obtain visitation rights under sec. 757.245(4), Stats. (1985-86) after the parents of the child have divorced, the biological father's paternal rights were terminated, and the child was adopted by the biological mother's new husband. The court concluded that the adoption severed all rights of the adopted child's birth family to the child. *Id.* at 573-74, 453 N.W.2d at 627. Allowing the grandparents to have visitation rights under

sec. 767.245(4) "would be at odds with the adoption statute's purpose of severing all rights of [the biological father] and his family to the child." *Id.* at 574, 453 N.W.2d at 627-28

The court reasoned that, under sec. 48.92(1), Stats., the second husband's adoption of the child established a status between him and the child identical to that which exists between a natural parent and his or her child. One of the rights parents have is to determine whether a relationship with grandparents is contrary to the child's best interests. Thus the court concluded it was for the parents (mother and adoptive father), not the court, to decide whether the grandparents would have visitation. *Id.*, 453 N.W.2d at 628.

We reach the same conclusion here, although we express the same regret that the statute requires this result as was expressed in the concurring opinion in *Soergel. Id.* at 575, 453 N.W.2d at 628. Section 48.92(1) and (2), Stats., severs all rights of the adopted child's birth family to the child upon the child's adoption. Adoption, in effect, terminates the grandparents' status as grandparents. Once that status no longer exists, the right to petition for visitation under sec. 880.155, Stats., also ceases to exist. After adoption, the stepfather and mother possess all of the rights of the child's natural parents, including the right to determine whether a relationship with the grandparents is in the child's best interest. Further, once the stepfather adopts the child, neither of her "parents" are deceased, and the statute on it face does not apply.

By the Court. — Order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)5, Stats.

State of Wisconsin, Sauk County
CIRCUIT COURT
Branch 2

In the Matter of the Grandparental
Visitation of: C.G.F. d/o/b/: 12/31/85
Case No. 90GN051

ORDER

The above matter came on for hearing on the 9th day of October, 1990, Petitioner, H. and F. F appearing in proper person and by counsel Douglas W. Kammer, Respondent T. L. appearing in proper person and by counsel Barbara A. Hughes, and Mark Reitz appearing as Guardian ad Litem for the minor child, C. F. and based upon the evidence then presented, and based upon the file and proceedings herein:

I HEREBY FIND that it is in the best interest of the minor child, C.G.F. born December 31, 1985, that she have visitation with her paternal grandparents, the petitioners herein.

IT IS HEREBY ORDERED:

1. That the grandparents shall visitation one weekend every three months from Friday evening to Sunday evening upon affording the respondent one week's notice, provided however, that consideration shall be given to pre-existing plans of the respondent and her family. That the first such visitation shall be in the month of November, 1990, PROVIDED, HOWEVER, that the visitation shall be shortened for the first two visits, from 9:00 a.m. to 6:00 p.m., and of only one day duration.

2. That the grandparents shall also have reasonable telephone contact with the child, meaning one call during reasonable hours of reasonable duration every other week, to be initiated by the petitioners.

3. That as to the visitation set forth above, the petitioners shall afford all the transportation required for the visitation.

4. That notwithstanding the foregoing, none of the visitation shall be exercised over weekends containing a major holiday.

5. That in the event the pending adoption does not proceed on Monday, October 15, 1990, the respondent shall provide the petitioners with her residential telephone number in order that telephone contact can be facilitated.

6. That any letters sent by the paternal grandparents to the child shall be delivered to the child, and the child shall be allowed to write back to the grandparents without interference.

7. That the foregoing provisions set forth in paragraphs 1 through 6 shall continue in force until the pending adoption of C.G.F. by her stepfather, D.J.L. is ordered by the Court. In the event said adoption proceeds and is ordered by the Court, this order shall become moot and have no force or effect. The fact that this Order becomes moot does not change the prior Finding of Fact by the Court that such visitation is in the best interest of the child, however, the completion of the adoption proceedings vests with the parents the determination relating to grandparent visitation.

8. The apppointment of the Guardian ad Litem shall continue until the adoption of the child by her stepfather, D.J.L. is ordered by the Court.

9. The grandparents shall have until December 15, 1990, to seek review of this Order and if no such review is sought, the Order shall become final.

Dated this 14 day of November, 1990.

BY THE COURT:

James Evenson
Circuit Judge

Copies to: Barbara Hughes
Douglas Kammer
Mark Reitz